

MANDATE

04-11864

450C/MA
Gorton, J**United States Court of Appeals
For the First Circuit**

No. 05-2285

IN RE: ROBERT RODRÍGUEZ,
Petitioner.

Before

Boudin, Chief Judge,
Torruella and Lynch, Circuit Judges.

JUDGMENT

Entered: October 2, 2007

Robert Rodríguez, whose petition to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 was denied, has filed an application for a certificate of appealability of that denial. The sole issue he seeks to raise on appeal is whether Cunningham v. California, 127 S. Ct. 856 (2007); United States v. Booker, 543 U.S. 220 (2005); and Blakely v. Washington, 542 U.S. 296 (2004), all of which were decided after his conviction and sentence became final, apply retroactively to cases on collateral review. The district court denied a certificate of appealability on that issue because it had not been raised in the district court.

As the district court recognized, a habeas petitioner's failure to raise a claim before the district court ordinarily bars the petitioner from raising that claim on appeal from the district court's denial of the petition. David v. United States, 134 F.3d 470, 474 (1st Cir. 1998). Although we have discretion to override such a forfeiture, "[t]o justify deploying this seldom-used power, . . . the newly emergent contention must be one that practically guarantees the appellant's success." Id. at 475.

The issue that petitioner seeks to raise here is not of that caliber. This court has already held that petitions under 28 U.S.C. § 2255 are unavailable to advance Booker or other "Blakely-like" claims in the absence of Supreme Court decisions rendering those cases retroactive. United States v. Fraser, 407 F.3d 9, 11 (1st Cir. 2005); Cirilo-Muñoz v. United States, 404 F.3d 527, 533 (1st Cir. 2005). Given those prior rulings, which would bind the panel assigned to decide this prospective appeal, United States v.

Malouf, 466 F.3d 21, 27 (1st Cir. 2006), cert. denied, 127 S. Ct. 1892 (2007), petitioner has not made the requisite "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), to warrant granting his application.

The application for a certificate of appealability is denied, and the appeal is terminated.

By the Court:

Richard Cushing Donovan, Clerk.

MARGARET CARTER

By: _____
Chief Deputy Clerk.

**Certified and Issued as Mandate
under Fed. R. App. P. 41.**

Richard Cushing Donovan, Clerk

WCD
Deputy Clerk

Date: 11/23/07

[cc: Robert Rodriguez, Dina M. Chaitowitz, AUSA]